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Law and Policy in the Amendment of Arms Control Agreements

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I. INTRODUCTION

During the Cold War era, countries negotiated numerous arms control agreements. The negotiations occurred between the superpowers, between their respective blocs, and during the annual multilateral United Nations Conference on Disarmament.¹

The end of the Cold War brought changes to the international security environment and technological developments in weapons systems.² The changes led to additional arms control treaties and to the reconsideration of earlier agreements.³ Amending arms

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1. See, e.g., Conference on Disarmament: Limited Progress Reported on Chemical Weapons Ban, 26 U.N. Chronicle 30 (Dec. 1989).

2. See LYNN E. DAVIS, AN ARMS CONTROL STRATEGY FOR THE NEW EUROPE 4 (1993).

3. See generally BRAD ROBERTS, WEAPONS PROLIFERATION AND WORLD ORDER AFTER THE COLD WAR (1996).

control treaties, however, is difficult because of the complexity of the negotiation process and security concerns. Therefore, countries are often understandably reluctant to amend arms control treaties. Nevertheless, some countries closely scrutinized a number of treaties, testing both the treaties' adaptability and the parties' willingness to consider change.⁴

4. See, e.g., The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter CWC]. In April 1997, the U.S. Senate included a set of over 20 "conditions" in the ratification instrument. These quite complex conditions do not formally constitute amendments or reservations to the treaty text. CWC Article XXII prohibits reservations. See also Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 493, 499-517 (1997). Members of the Ad Hoc Group to the Convention on the Prohibition of the Development, Production and Stockpiling of Biological and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583 [hereinafter BWC] are now negotiating a verification protocol. See also 'Rolling Text' for BWC Protocol Introduced, ARMS CONTROL TODAY, June-July 1997, at 27. Among bilateral arms control treaties, the Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, 944 U.N.T.S. 13 [hereinafter ABM] underwent a series of modifications and attempted reinterpretations since 1972 while attempting to ensure the maintenance of a strategic balance between the United States and Russia in light of technological advances. The Reagan administration initially attempted to reinterpret the ABM treaty to allow certain Strategic Defense Initiative tests, but the Soviet Union and key members of the U.S. Congress rejected these interpretations. More recently, controversy focused on distinguishing between strategic defense systems that would be governed by the ABM treaty and defenses against theater ballistic missiles (such as the SCUD missiles Iraq used in both its war with Iran and the 1991 war over Kuwait), that would not be limited by the ABM treaty. A series of agreements between the United States and Russia, Belarus, Ukraine and Kazakhstan partially resolved some of the latter issues. Most recently, indeed in January 1999, the U.S. government indicated that it was exploring a national missile defense system, which may require "modification" of the ABM treaty. See Memorandum of Understanding Relating to The Treaty Between the United States of America and the Union of Soviet Socialist Republics On The Limitation of Anti-Ballistic Missile Systems of May 26, 1972, reprinted in *New START II and ABM Treaty Documents*, 27 ARMS CONTROL TODAY 19, 20 (1997); see also First Agreed Statement Relating to The Treaty Between the United States of America and the Union of Soviet Socialist Republics On The Limitation of Anti-Ballistic Missile Systems of May 26, 1972, reprinted in *New START II and ABM Treaty Documents*, 27 ARMS CONTROL TODAY 19, 21 (1997); Second Agreed Statement Relating to The Treaty Between the United States of America and the Union of Soviet Socialist Republics on The Limitation of Anti-Ballistic Missile Systems of May 26, 1972, reprinted in *New START II and ABM Treaty Documents*, 27 ARMS CONTROL TODAY 19, 21 (1997); Common Understanding Related to The First Agreed Statement of September 26, 1997, Relating to The Treaty Between the United States of America and the Union of Soviet Socialist Republic on The Limitation on Anti-Ballistic Missile Systems of May 26, 1972, reprinted in *New START II and ABM Treaty Documents*, 27 ARMS CONTROL TODAY 19, 21 (1997); Common Understanding of The Second Agreed Statement of September 26, 1979, Relating to The Treaty Between the United States of America and the Union of Socialist Republics on The Limitation of Anti-Ballistic Missile Systems of May 26, 1972, reprinted in *New START II and ABM Treaty Documents*, 27 ARMS CONTROL TODAY 19, 22 (1997);

Instances exist where a treaty requires modification to remain relevant and viable. During the life of a treaty, disputes arise over legal interpretations that require resolution. Additionally, technological advances or changes in national security requirements may require modifications to the arms control agreements. A party's tacit neglect of the need for modification, a lack of confidence in the treaty, or even outright non-compliance can make a treaty obsolete.

This Article examines both the legal theory and the practical realities involved in amending an international arms control agreement. First, the Article reviews the customary international law applicable to amending multilateral treaties. Second, it examines the amendment provisions included in every major multilateral arms control agreement since World War II.⁵ Alternative efforts to change a treaty in force, as opposed to formal amendments, will also be discussed.⁶ Finally, the Article examines the rationales behind the amendment provisions, why nations have not properly utilized these provisions, and suggests alternatives to treaty amendments.

II. EARLY HISTORY OF ARMS CONTROL AMENDMENT PROCEDURES

The birth of international arms control law can be traced to St. Petersburg, Russia.⁷ One hundred and thirty years ago, the Russian Czar's government convened the first international conference to consider prohibiting the small-caliber explosive bullet.⁸ The conference resulted in the St. Petersburg Declaration (Declaration), the first multilateral treaty to ban or restrict the use of a particular weapon in war.⁹ The Declaration marked a new phe-

Agreement on Confidence-Building Measures Related To Systems To Counter Ballistic Missiles Other Than Strategic Ballistic Missiles, *reprinted in New START II and ABM Treaty Documents*, 27 ARMS CONTROL TODAY 19, 23 (1997).

5. This Article primarily focuses on the discussion of multilateral treaties. Where relevant, however, reference is made to bilateral treaties, such as the ABM Treaty, for illustration purposes.

6. See *infra* Part IV.A, discussing alternative means to the amendment process.

7. See Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grammes, Weight, *signed* Nov.29/Dec.11, 1868, *reprinted in* THE LAWS OF ARMED CONFLICTS 101 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter St. Petersburg Declaration].

8. See *id.*

9. See *id.* In 1863, the Russian army developed an explosive rifle bullet that deto-

nomenon in both diplomatic history and international law.

The delegates at the St. Petersburg conference foresaw the need to amend or revise the treaty. The final paragraph of the Declaration reflects this sentiment:

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition may be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.¹⁰

The delegates failed, however, to include procedural details. For example, the provision does not include a filtering process for determining whether a new proposition meets the "precise proposition" requirement. The provision does not clarify who might legitimately draft a "precise proposition" for new arms restrictions. While parties to the Declaration have standing to make a "precise proposition," non-parties are not explicitly excluded.¹¹ Contrary to the nineteenth century idea of state sovereignty, the parties might consider proposals from a non-governmental organization, such as the then newly-formed International Committee of the Red Cross.

Additionally, the Declaration does not specify the means to consider and approve the new proposition. Suppose, for example, that one party proposed amending the Declaration to prohibit explosive rounds weighing 500 grams instead of the original 400 grams. Although this appears to be a "precise proposition" within the meaning of the final clause of the Declaration, it is unclear how

nated upon impact with a hard surface, and that could, therefore, be used to attack artillery caissons and ammunition wagons. By 1867, however, this projectile had been modified to explode upon impact with a soft surface, such as human flesh. At this point, the Russian government sought an international ban on the use of such weapons. See Stat., *supra* note 7. The rationale behind the Declaration was that an enemy soldier wounded by a mid-nineteenth century rifle bullet would almost certainly be out of action by that impact alone. To further aggravate his wound by using an explosive bullet was militarily unnecessary and needlessly cruel. See Burrus M. Carnahan, *Unnecessary Suffering, The Red Cross and Tactical Laser Weapons*, 18 LOY. L.A. INT'L & COMP. L.J. 705, 715-17 (1996). The United States did not participate in the St. Petersburg Conference. It is interesting to note, moreover, that similar explosive bullets had been occasionally used in the American Civil War. By the end of that conflict, both General Ulysses S. Grant and the U.S. Army Chief of Ordnance had also concluded that such munitions were inhumane and should no longer be used. See ROBERT BRUCE, LINCOLN AND THE TOOLS OF WAR 282 (1989).

10. St. Petersburg Declaration, *supra* note 7, at 102.

11. See *id.*

the parties would proceed with the proposal.¹²

As the Declaration's depository, the Imperial Russian government might convene a second St. Petersburg conference to consider such a proposal. If it refused to undertake this role, however, another party would not be precluded from hosting the conference.¹³ Furthermore, it is unclear whether a conference is even necessary. In principle, the parties to the Declaration can implement a new restriction by exchanging diplomatic notes.

Regardless of whether a conference is held or the new proposal is considered solely through diplomatic channels, the proposal's fate is unclear. If the parties to the Declaration disagree on the proposal, it is unclear whether other means of adoption are available.¹⁴

It is assumed that the drafters of the St. Petersburg Declaration intended customary international law to determine these procedural issues. The old customary rule allowing multilateral treaty amendments, which was still applied as late as the middle of the twentieth century, required unanimous consent.¹⁵ Thus, the parties to the St. Petersburg Declaration likely assumed that amendment or revision required unanimity.

The assumption that an amendment or revision requires unanimity is also supported by the following clause in the Declaration, "[the Agreement will] . . . cease to be compulsory from the moment when, in a war between Contracting or Acceding Parties, a non-Contracting Party or a non-Acceding Party shall join one of the belligerents."¹⁶ Thus, once a non-party enters into a conflict with any of the parties, the Declaration is suspended. As a result, the parties are allowed to use the small caliber bullet against any belligerent power.

The clause shows the parties' intent to eliminate a two-tiered set of obligations. It must be assumed, therefore, that the parties also intended to exclude any amendment that did not have unani-

12. *See id.*

13. *See id.*

14. *See id.*

15. *See* SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 106 (2d ed. 1984). For example, until the adoption of a protocol establishing amendment procedures, the International Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949, 1 U.S.T. 477, 481 could only be amended by unanimous consent of its 16 parties. *See* *The Law of Treaties and other International Agreements*, 1973 DIGEST §§ 3-4, at 183-84.

16. St. Petersburg Declaration, *supra* note 7, at 102.

mous consent. A non-unanimous amendment could create a two-tiered regime where, for example, some parties banned the use of exploding bullets under 500 grams, while others were bound only by the original 400 gram limit.

The amendment and revision clause of the St. Petersburg Declaration may best be described as rudimentary. Nonetheless, most other nineteenth and early twentieth century arms control and limitation agreements did not include amendment provisions.¹⁷

The 1907 Hague Convention on Naval Contact Mines (1907 Convention) was the only treaty to include a review and revision provision.¹⁸ The provision allowed for treaty review and revision either six and one-half years after its entry into force or at the Third Hague Peace Conference, whichever occurred first.¹⁹ The provision concluded with the following clause: "If the Contracting Parties conclude a fresh Convention relative to the employment of mines, the present Convention shall cease to be applicable from the moment it comes into force."²⁰ The clause seems to infer that the parties to the 1907 Convention must act unanimously especially since it does not provide that it shall remain in force for states not consenting to the amendment.

The hostility towards a two-tiered system of arms control obligations continued to exist during the early 1900s. Many of the agreements included a clause, similar to one in the St. Petersburg Declaration, lifting the obligations of the parties in any war in which a non-party participated.²¹ This pattern supports the con-

17. See, e.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 U.N.T.S. 65; The Hague Declaration of 1907 (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, Oct. 18, 1907, *reprinted in* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 7 at 1, 2 [hereinafter Declaration XIV]; Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899, *reprinted in* THE LAW OF ARMED CONFLICTS, *supra* note 7, at 105 [hereinafter Declaration (IV, 2)]; The Hague Declaration of 1899 (IV, 3) Concerning Expanding Bullets, July 29, 1899, *reprinted in* THE LAW OF ARMED CONFLICTS, *supra* note 7, at 109 [hereinafter Declaration (IV, 3)].

18. See Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Art. 12, Oct. 18, 1907, *reprinted in* 36 Stat. 2332 [hereinafter Convention (VIII)].

19. See *id.* The outbreak of World War I prevented both the Third Hague Peace Conference and the alternative review contemplated by Article 12.

20. *Id.* art. 12.

21. See *id.* art. 7; Declaration (XIV), *supra* note 17, at 1839, 1840; Declaration (IV, 2), *supra* note 17, at 106; Declaration (IV, 3), *supra* note 17, at 110.

clusion that early arms control agreements required unanimous approval for revisions.

Outside the field of arms control, however, the parties to multilateral agreements often ignored the unanimous rule. For example, during the Second Hague Peace Conference of 1907, the delegates extensively revised the 1899 Convention on the Laws and Customs of War on Land.²² They also redrafted its articles on neutrality,²³ despite the fact that seventeen parties to the original Convention were not parties to the revised Convention of 1907.²⁴

The departure from the unanimous text of the 1907 Convention allowed a two-tiered system of obligations. The 1907 Convention specifically provides that "[t]he Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention."²⁵ Despite the departure from the unanimous rule, parties have never questioned the legitimacy of the 1907 Convention or the proceedings of the 1907 Hague Peace Conference.

After World War II, a number of factors further undermined the unanimous doctrine. First, international organizations' constitutional documents typically included specific provisions for amendment procedures.²⁶ Second, the proliferation of multilateral agreements led to greater awareness of the need for amendment procedures.²⁷ Third, the growth in the number of independent states following the decolonization process made unanimity pragmatically impossible.²⁸ Finally, the Vienna Convention on the Law of Treaties in 1968 resulted in the unanimity presumption's

22. See Revision of Convention (II) With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 *as adopted in* Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227.

23. See Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons In Case of War on Land, Oct. 18, 1907, 36 Stat. 2310.

24. Korea and Spain represent the only parties to the 1899 Convention (II) With Respect to The Laws and Customs of War on Land who neither signed nor acceded to the Convention. In addition, Argentina, Bulgaria, Chile, Colombia, Ecuador, Greece, Italy, Montenegro, Paraguay, Peru, Persia, Serbia, Turkey, Uruguay and Venezuela, all parties to the 1899 Convention, signed, but never ratified the 1907 Convention. See THE LAWS OF ARMED CONFLICT, *supra* note 7, at 88-91.

25. Convention (IV), *supra* note 23.

26. For a listing of various agreements after WWII with amendment procedures, see *infra* notes 56-58.

27. See Multilateral Treaties Deposited with the Secretary-General: Status as of Dec. 31, 1993, U.N. Doc. ST/LEG/SER.E/12 (1993).

28. See SINCLAIR, *supra* 15, at 106.

final demise.²⁹

Articles 40 and 41 of the Vienna Convention, which govern multilateral agreement amendments in the absence of any provision in the treaty, abolish the presumption of the unanimous rule.³⁰ Article 40 addresses amendments where all parties to the treaty have had the opportunity to negotiate and participate.³¹ Paragraph 3 of Article 40 provides that after the negotiation of an amendment, "[e]very State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended."³² Paragraph 4 of Article 40 states that "[t]he amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement."³³ So long as all parties have had an opportunity to participate in the process, these provisions imply that only the support of a few parties is needed to affect an amendment to a multilateral treaty.

Article 41 rejects the old unanimity rule even more emphatically. It allows two or more parties to a multilateral treaty to modify the treaty *as between themselves*, so long as the treaty text does not provide otherwise and the proposed modification:

"(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective executions of the object and purpose of the treaty as a whole."³⁴

29. See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 40-41, 8 I.L.M. 679, 694-5 (1969). The Convention is widely recognized as an authoritative restatement of customary international law even for states, such as the United States, that are not parties to it. "Since . . . most articles of the Convention codify customary international law, they reflect the law even for states that have not adhered to the Convention, and in many cases even for agreements concluded before the Vienna Convention came into force." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note, Part III, at 146-47. In summarizing the practice of the International Court of Justice, one authority recently observed, "[w]henver the Court has found it appropriate, it has referred to the Convention in its jurisprudence; and this may be an indication that in its view the instrument has—in large part at least—been received in the whole of general international law." E.W. Vierdag, *The International Court of Justice and the Law of Treaties in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 145, 146 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

30. See Vienna Convention on the Law of Treaties, arts. 40-41, *supra* note 29, at 694.

31. See *id.* art. 40.

32. *Id.*

33. *Id.*

34. *Id.*

Finally, amendment or modification practices suggest that amending or modifying arms control agreements may represent a *lex specialis*, departing from the liberal regime reflected in Articles 40 and 41 of the Vienna Convention on the Law of Treaties.³⁵

III. AMENDMENT PROCEDURES IN POST-WWII ARMS CONTROL TREATIES³⁶

This section briefly surveys amendment procedures for selected arms control treaties, beginning with the 1959 Antarctic Treaty and ending with the 1997 Anti-Personnel Landmines Convention (APL). By comparing procedural requirements for amendment, several patterns become evident. Treaties typically fall within one of three categories, to be discussed below.

The 1959 Antarctic Treaty is arguably the first post-World War II arms control agreement.³⁷ The treaty, enacted at the end of the 1958-59 International Geophysical Year, preserved Antarctica for peaceful scientific research. The Antarctic Treaty was not exclusively an arms control treaty, but also negotiated other interests, including environmental concerns and scientific cooperation.³⁸

Arms control provisions were included in the treaty to prevent Cold War rivals from using the continent for military purposes.³⁹ For example, Article I provides that Antarctica may be used for "peaceful purposes only," and it prohibits "any measures of a military nature" including "the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons."⁴⁰ In addition, Article V prohibits nuclear explosions in Antarctica.⁴¹

The Antarctic Treaty includes specific amendment provisions in its text. Article XII(1) describes the requisite amendment and

35. See Vienna Convention on the Law of Treaties, arts. 40-41, *supra* note 29, at 694.

36. This Article primarily focuses on the discussion of multilateral treaties. Where relevant, however, this Article references bilateral treaties such as the Anti-Ballistic Missile Treaty for illustration purposes. See *infra* p. 638, Table 1, Amendment Procedures for Selected Arms Control Treaties, for a description of the amendment requirements of the major post-World War II arms control treaties.

37. See Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 72.

38. See *id.*

39. See F.M. AUBURN, ANTARCTIC LAW AND POLITICS 84-94 (1982) for a discussion on the origins of the Treaty.

40. Antarctic Treaty, *supra* note 37, 12 U.S.T. at 795, 402 U.N.T.S. at 72.

41. See *id.* at 796, 76.

modification procedures:

The present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in meetings provided under Article IX. Any such modification or amendment shall enter into force when the depositary government has received notice from all such Contracting Parties that they have ratified it.⁴²

Article IX provides that the twelve original parties to the Treaty, plus others engaged in "substantial scientific research" in Antarctica, will hold "consultative meetings" on implementing the Treaty.⁴³ As of 1995, twenty-five of the thirty-nine parties held "consultative" status.⁴⁴ Although the "consultative" parties cannot bring an amendment into force for all the contracting parties, paragraph 1(b) of Article XII states that any amendment agreed to by the "consultative" parties must be ratified within two years by the other parties to the Treaty or they will lose their party status.⁴⁵ As a result, amendments proposed by the "consultative" parties are provisionally implemented regardless of the "non-consultative" parties agreement.

The 1963 Limited Nuclear Test Ban Treaty⁴⁶ (LTBT) represents the first multilateral arms control treaty with detailed amendment provisions. Similar to the Antarctic Treaty, the LTBT differentiates the original parties' role in amendment procedures from the other parties to the treaty.⁴⁷ The LTBT requires unanimity among the three original parties (the United States, Russia,⁴⁸ and the United Kingdom) when voting for an amendment;

42. *Id.* at 798, 80-81.

43. The 12 original parties include Argentina, Australia, Belgium, Chile, French Republic, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. *See id.* at 795.

44. In addition to the 12 original parties, Brazil, China, Germany, India, Italy, Poland, and Uruguay have achieved consultative status. Bulgaria, Canada, Czech Republic, Denmark, Ecuador, Finland, Greece, Republic of Korea, Netherlands, Papua New Guinea, Peru, Romania, and Sweden do not have consultative status. *See Antarctic Treaty Special Consultative Meeting on Antarctic Mineral Resources: Final Act and Convention on the Regulation of Antarctic Mineral Resource Activities*, 27 I.L.M. 859 (1988).

45. *See Antarctic Treaty*, *supra* note 37, 12 U.S.T. at 799, 402 U.N.T.S. at 82.

46. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

47. *See id.*

48. As successor to the Soviet Union.

however, these parties cannot amend the treaty alone.⁴⁹ The LTBT amendment process allows any party to propose an amendment followed by one-third of the parties calling for a conference.⁵⁰ At the conference, a majority of all parties, including the original three, must vote in favor of adoption.⁵¹

The final sentence of Article II makes the LTBT unusual. Once adopted by the conference, "[t]he amendment shall enter into force *for all Parties* upon the deposit of instruments of ratification by *a majority of all the Parties*, including the instruments of ratification of all the Original Parties."⁵² Thus, the retreat from the unanimity rule in the LTBT extends beyond that in the Antarctic Treaty. For example, a party that never ratified the amendment or even voted against it at the conference may be bound by the amendment.⁵³

Both the Antarctic Treaty and the LTBT retreat from the unanimity rule. Under the procedures of both treaties, there is no possibility of a two-tiered set of treaty obligations. As a result, parties bound by the original text are also bound by an amendment.⁵⁴ After 1963, however, the pendulum began to swing towards two-tiered treaty obligations.

With one exception,⁵⁵ arms control agreements concluded after the LTBT may be classified into three general categories. The first category consists of treaties with significant procedural impediments to amendment. The treaties allow some parties to opt out of the amendment while remaining bound by the original treaty text.⁵⁶ The second category of treaties are less difficult to

49. See Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, *supra* note 46, art. II (2), 14 U.S.T. at 1317, 480 U.N.T.S. at 47.

50. See *id.* art. II (1).

51. See *id.* art. II (2).

52. *Id.* (emphasis added).

53. See *id.* art. II (2).

54. See *id.*

55. See African Nuclear Weapons Free Zone Treaty, *opened for signature* Apr. 11, 1996, art. 19, 35 I.L.M. 698. This treaty reverts to the LTBT pattern. It provides for proposed amendments to be circulated to all parties. If adopted by a vote of two thirds of the parties, an amendment "shall enter into force for *all parties* after receipt by the Depositary of the instrument of ratification by the *majority of Parties*." *Id.* at 712 (emphasis added).

56. See, e.g., Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, art. 13 (5), 36 I.L.M. 1507, 1517 [hereinafter Convention on Anti-Personnel Mines]; Convention on the Physical Protection of Nuclear Materials, Oct. 26, 1979, art. 20, T.I.A.S. No. 11080, at 4 (ratification of amendment by two thirds of parties required); Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, art. VIII, 21 U.S.T. 483, 491-192, 729

amend, but still require acceptance by a majority. Again, the treaties permit parties to remain bound to the original treaty text without being bound to subsequent amendments.⁵⁷ The third category of treaties are those that recently returned to the unanimity rule, or that required amendment adoption by consensus.⁵⁸

*A. The First Group: Complex and Difficult Amendment,
Stricter Procedures*

Procedural requirements for amendments to the first group typically include the following: (1) A certain percentage of parties (usually one-third, one-half, or a majority) supporting convening an amendment conference; (2) A conference of states parties considering the amendment; (3) A special majority (often two thirds of the states party, and sometimes including key states such as the treaty depositaries) approving the amendments; (4) Entry into force (EIF) after a majority of parties (again including key states) ratifies and accedes to the amendments; and (5) EIF *only* for those parties ratifying or acceding to the amendment.⁵⁹

U.N.T.S. 161, 173-174 [hereinafter NPT] (both a favorable vote of the depositaries [such as Russia, United Kingdom and United States] at the amendment conference and ratification by the depositaries are required for entry into force of any amendment).

57. See, e.g., Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, art. VI, 16 I.L.M. 88; BWC, *supra* note 4, art. II; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1972, art. VI, 23 U.S.T. 701, 707, 955 U.N.T.S. 115, 119 [hereinafter Treaty on the Prohibition of the Emplacement of Nuclear Weapons]; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 2420, 610 U.N.T.S. 205, 208 [hereinafter Treaty Governing Outer Space]. The Treaty Governing Outer Space includes arms control provisions in Article IV, which, *inter alia*, prohibit the orbiting of weapons of mass destruction around the earth and the creation of fortifications or military bases on the moon and other celestial bodies. See *id.* art. IV, at 2413.

58. See Comprehensive Test Ban Treaty, Sept. 24, 1996, art. VII, 35 I.L.M. 1439, 1455-56; Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Dec. 15, 1995, art. 19, 35 I.L.M. 635, 645; CWC, *supra* note 4, art. XV; Treaty on Open Skies, Mar. 24, 1992, art. XVI S. TREATY DOC. NO. 102-37, 27 (1992); Treaty on Conventional Forces in Europe, Nov. 19, 1990, art. XX, 30 I.L.M. 1; South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, art. 11, 24 I.L.M. 1440, 1449; Convention on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Apr. 10, 1981, art. 8, 19 I.L.M. 1523, 1527-28 [hereinafter Convention on Conventional Weapons].

59. An exception to this feature is found in the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281. Under Article 29, proposed amendments, after circulation to all parties, require a two thirds vote of those states present and voting at a special session of the General Conference of states party to the Treaty.

These procedural hurdles serve to make amendments more difficult, perhaps ensuring that parties carefully weigh and debate amendments prior to their EIF. For the United States and other Western countries, these procedures prevent an "automatic majority," such as the bloc of non-aligned countries, from adopting amendments.

B. The Second Group: Lower Hurdles, Simpler Procedures

Like the first group, the second category of treaties only binds states when they ratify an amendment, thereby potentially resulting in a two-tiered obligation scheme. Treaties of this type generally present fewer impediments to the amendment process. For example, any party may propose an amendment and an amendment conference is not required.⁶⁰ Furthermore, although a majority is needed to ratify an amendment, the amendment binds only those states that vote for its adoption.⁶¹ Since majority acceptance is a prerequisite for successful amendment, the second group of agreements are not as liberal as Article 40 of the Vienna Convention.⁶²

The treaties included in this group regulate two types of military systems: (1) those that have never been deployed, and (2) those that were of little military significance at the time the treaty was enacted. For example, the treaties that regulate orbiting nuclear weapons, nuclear weapons deployed on the seabed or the moon, high-threshold environmental weapons and biological

Amendments so adopted then enter into force "as soon as the requirements set forth in Article 28 . . . have been complied with." *Id.* Article 28 sets forth the EIF requirements for the Treaty as a whole. Paragraph 1 requires ratification by all Latin American Republics, and all other sovereign states in the Western Hemisphere located entirely south of latitude 35 degrees north, in existence on February 14, 1967, as a condition of entry into force. *See id.* art. 28, para. 1. Since several of the states in the region have failed to ratify (e.g., Cuba), the Treaty has never formally entered into force. *See* Paragraph 2 of Article 28, however, grants all signatory states the "imprescriptible right to waive, wholly or in part, the requirements laid down in the preceding paragraph," by means of a declaration annexed to their ratification instruments. *Id.* art. 28, para. 2. The Treaty is thus in force for a number of Latin American states. An amendment could presumably be ratified with a similar declaration, allowing it to come into force for any single state for which the basic Treaty is in force.

60. *See* Treaty on the Prohibition of the Emplacement of Nuclear Weapons, *supra* note 57, art. VI, 23 U.S.T. at 707.

61. *See id.*

62. *See* Vienna Convention on the Law of Treaties, *supra* note 29, art. 40, 8 I.L.M. at 694-95. "Every state entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended." *Id.* at 694.

weapons.⁶³ The apparent assumption was that there was relatively slight risk of adopting ill-considered amendments for treaties of minimal military significance.

Subsequent developments, however, cast doubt on this assumption. For example, in the case of the Biological and Toxins Weapons Convention (BWC), the threat of biological weapons is not as minimal as previously imagined at the time of the treaty's inception in the 1960s. Various incidents, such as the Sverdlovsk event in the early 1980s, the affirmation of an active offensive biological weapons program in the Soviet Union, and the discovery of Iraq's offensive biological weapons research question the assumption that these treaties have minimal military significance.⁶⁴

C. *The Third Group: Unanimity or Consensus*

The third group of treaties embrace the unanimity rule that requires unanimous approval and ratification before an amendment binds the parties. The return of the unanimity rule is most prevalent in the South Pacific Nuclear Free Zone Treaty, the Conventional Armed Forces in Europe Treaty (CFE), and the Open Skies Treaty.⁶⁵ The disadvantage of this approach is that one party's inaction may cause an important amendment to fail. This inaction may be the consequence of a domestic crisis or other reasons unrelated to the merits of the amendment.

The three treaties, mentioned above, that apply the unanimity rule consist of regional arrangements with a limited number of potential parties. The negotiators apparently accepted the risk that an important amendment could fail due to careless inaction. This risk increases significantly when the treaty is open to participation by any or all of the approximately 200 independent states of the world. Therefore, arms control treaties involving a large number of participants adopt other mechanisms for reintroducing the unanimity principle.

63. See generally Treaty Governing Outer Space, *supra* note 57, 18 U.N.T.S. at 205; Treaty on the Prohibition of the Emplacement of Nuclear Weapons, *supra* note 57; BWC, *supra* note 4.

64. See, e.g., Ambassador Rolf Ekeus, *Leaving Behind the UNSCOM Legacy in Iraq*, ARMS CONTROL TODAY, at 3-6 (June/July 1997) <<http://www.armscontrol.org/ACT/junjul/ekeus.htm>>; Milton Leitenberg, *Anthrax in Sverdlovsk: New Pieces to the Puzzle*, ARMS CONTROL TODAY, Apr. 1992, at 10-13.

65. See treaties cited *supra* note 58.

The Convention on Conventional Weapons and the Southeast Asia Nuclear Weapons Free Zone Treaty both require that a consensus at a conference of the parties first approve potential amendments.⁶⁶ A State Department memorandum differentiates consensus decision-making in international bodies from unanimity:

In practice, consensus means that the decision is substantially acceptable to delegations and that those which have difficulties with certain aspects of the resolution are willing to state their reservations for the record rather than vote against it or record a formal abstention. Consensus must be distinguished from unanimity, which requires the affirmative support of all participants. Essentially, consensus is a way of proceeding without formal objection. Yet the result is virtually the same: a resolution is adopted with the support of all states present, albeit frequently with recorded statements of reservation or interpretation.⁶⁷

Although a conference applying the consensus method does not require every party to affirmatively vote in favor of the amendment, the procedure gives any party the power to veto the amendment by openly voicing an objection. Therefore, the consensus method has virtually the same practical effect as the unanimity method. The only difference is that inaction by a single party in a consensus procedure does not block the amendment.

Two recent arms control agreements, the Chemical Weapons Convention (CWC) and the Comprehensive Test Ban Treaty (CTBT), go beyond the consensus rule by requiring both a majority vote of the parties to approve adoption and no parties voting against the amendment.⁶⁸ As a result, a party's simple inaction is insufficient to block an amendment. Any party with substantive objections may block an amendment only by affirmatively voting

66. See Treaty on the Southeast Asia Nuclear Weapon-Free Zone, *supra* note 58, 35 I.L.M. Article 19 explicitly mentions consensus as the procedure for approving a treaty amendment at a meeting in which all parties are necessary to establish a quorum. The Convention on Conventional Weapons states that the amendment conference "may agree upon amendment which shall be adopted and shall enter into force in the same manner as this Convention" adopted an amendment using a consensus procedure. See Convention on Conventional Weapons, *supra* note 58; Captain J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, 105 MIL. L. REV. 3, 41-44 (1984).

67. Subjects of International Law, 1978 DIGEST § 4, at 158.

68. See CWC, *supra* note 4, 32 I.L.M. at 820; see also Comprehensive Test Ban Treaty, *supra* note 58, 35 I.L.M. at 1455-57.

against it.

IV. EXPLAINING THE PATTERNS

Comparing the various amendment procedures automatically gives rise to certain questions. Why adopt amendment provisions at all? As the Vienna Convention on the Law of Treaties suggests, why should two sovereign states not have the right to voluntarily amend a treaty bilaterally? Moreover, should a hold-out-state be forced to accept an amendment that it has not ratified under certain circumstances? Finally, do the amendment procedures have evident patterns?

In resolving these issues, a general pattern in the negotiation process addressing amendments is suggested. As Table 1 illustrates, some treaties have less rigorous amendment procedures than others. Treaties dealing with serious threats to the balance of power, such as nuclear and chemical weapons, and the balance of conventional forces in Europe, are more difficult to amend.⁶⁹

Despite the careful drafting of the amendment provisions, amendment efforts rarely succeed. It is possible that these amendment procedures were drafted to deter and prevent amendment efforts.⁷⁰ The complex procedural and approval requirements necessary to successfully amend a treaty illustrate this notion. Thus, amending treaties addressing highly controversial and important subjects is more difficult.

A. *Alternatives to Amendment*

The major problem with current amendment procedures is that they often create a multi-tier treaty regime. With the few exceptions noted above, most treaties bind only those parties that ratify the amendment. The resulting multi-tier treaty that binds some parties to certain provisions is often impractical.

The meaning and application of a treaty, however, may be altered without resorting to amendment procedures. Alternatives to treaty amendments include creating a protocol, entering into politically binding agreements, and reaching a consensus on interpretation of treaty provisions. These alternatives may be more practi-

69. See, e.g., Treaty on the Prohibition of the Emplacement of Nuclear Weapons, *supra* note 57; see also Treaty Governing Outer Space, *supra* note 57.

70. See generally Roach, *supra* note 66.

cal than amendments because a multi-tier treaty is avoided.

In 1965, the U.N. Security Council membership expanded from eleven to fifteen members.⁷¹ It would have been impractical for some members to recognize an eleven member Security Council, while others recognize a fifteen member Council. In fact, under Articles 108 and 109 of the U.N. Charter, amendments become binding on all members when ratified by two-thirds of the members.⁷²

Few multilateral treaties have been formally amended. With the BWC, the parties are seeking stronger verification provisions.⁷³ It is uncertain whether this will lead to a formal amendment. Even a rudimentary verification system, such as challenge inspection procedures, would entail considerable additions to the BWC text. Additionally, the non-binding amendment procedures in Article XI of the Convention would likely result in some BWC parties remaining outside new verification arrangements.⁷⁴ This would require substantial change and possibly lead to a two-tiered system of obligations. Thus, it is more practical to have verification arrangements in the form of a protocol to the Convention rather than an amendment to the relevant articles.

As a separate treaty, a protocol would not require ratification by a majority of the BWC parties and would avoid even the minimal procedural restraints in the BWC amendment procedures.⁷⁵ Judiciously, Article 41 of the Vienna Convention classifies such a protocol as a modification of a multilateral treaty between the parties.⁷⁶ Adoption of a verification protocol appears to meet the Vienna Convention standards for such modification.⁷⁷ Establishing more stringent verification provisions among certain BWC parties should not affect the rights afforded to other parties under the

71. See *Questions Relating to the United Nations Charter and Membership in the United Nations*, 1965 U.N.Y.B. 232, U.N. Sales No. 66.I.1.

72. See Burrus M. Carnahan, *Treaty Review Conferences*, 81 AM. J. INT'L L. 226 (1987).

73. See 'Rolling Text' for BWC Protocol Introduced, *supra* note 4, at 27; Jonathan B. Tucker, *Strengthening the Biological Weapons Convention*, ARMS CONTROL TODAY, Apr. 1995, at 10.

74. See BWC, *supra* note 4, 26 U.S.T. at 590.

75. See Barbara Hatch Rosenberg & Gordon Burck, *Verification of Compliance with the Biological Weapons Convention*, in PREVENTING A BIOLOGICAL ARMS RACE 300, 302-03 (Susan Wright ed., 1990); Cf. Tucker, *supra* note 73, at 12.

76. See Vienna Convention on the Law of Treaties, *supra* note 29, 8 I.L.M. at 694.

77. See *id.*

treaty, or the performance of their obligations.⁷⁸ The protocol would not relate to a provision, because any derogation from existing provisions would be incompatible with the effective execution of the treaty.⁷⁹

Ultimately, practical rather than theoretical considerations will dictate the process for changing treaties. If the textual scope of the change is minute in comparison to the treaty, an amendment might be more appropriate than adding a separate protocol to the treaty.⁸⁰

Short of amending the original text or creating a protocol, other possible means to change a treaty include: (1) a side agreement or memorandum of understanding which, unlike a protocol, would have no direct reference to the treaty *per se*; (2) a politically-binding agreement, which implies that it is binding in the current political context but lacks the weight of a legally-binding agreement; and (3) identical letters of intent, which would be sent to depositaries as an expression of parallel policies.

Occasionally, the parties may avoid amendment procedures if they reach a consensus on the interpretation of a treaty provision. In the BWC, for example, there is some confusion over what the Convention prohibits. Article I forbids possession of agents "of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes."⁸¹ By emphasizing the phrase "of types and in quantities," this language can be read to prohibit *only types and quantities* for which there is no conceivable peaceful use. According to this narrow interpretation of Article I, parties are permitted to possess the agents in question as long as they were designated for peaceful uses.⁸²

A broader reading of Article I prohibits possession of *any* biological agents, no matter what type or in what quantity, that is not intended for peaceful purposes. This interpretation is more

78. If the verification protocol included stricter accounting provisions for the export of biological agents, BWC parties who are not parties to the protocol might argue that it violated their right under BWC Article X to participate in "the fullest possible exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes." See BWC, *supra* note 4, 26 U.S.T. at 590.

79. See Vienna Convention on the Law of Treaties, *supra* note 29.

80. For example, the expansion of the Security Council required changing only one or two words in each of several Charter Articles.

81. BWC, *supra* note 4, 26 U.S.T. at 587.

82. See *id.*

consistent with the purpose of the BWC, but it stretches the actual language of Article I.

An amendment to Article I is one way to resolve this ambiguity. Amending the article, however, may not be necessary nor desirable. A more effective way to handle the ambiguities would be an authoritative interpretation (as described in Article 31 of the Vienna Convention) through the practice of key state parties.⁸³

An authoritative interpretation would allow a substantial number of the BWC parties to publicly declare that they interpret Article I to prohibit *any* type and quantity of agent not actually intended for peaceful purposes. This declaration would effect subsequent practice, reflecting the true interpretation of Article I.⁸⁴ These interpretations do not need to be expressly accepted by all BWC parties for international law to recognize them as authoritative interpretations of the Convention. If the Final Document of a BWC Review Conference accepted the interpretations by consensus, the interpretations would be valid and bind all BWC parties.⁸⁵

The alternatives to treaty amendment are viable means of updating and interpreting treaties. Parties exercising these alternatives can grant clarity and longevity to a treaty's effectiveness.

83. Under Article 31 of the Vienna Convention on the Law of Treaties, which is generally accepted as customary international law, the factors to consider when interpreting treaty obligations include "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, *supra* note 29.

84. See BWC, *supra* note 4, 26 U.S.T. at 587.

85. See Carnahan, *supra* note 72, at 228. In 1986, the Final Declaration of the Second Review Conference of Parties to the BWC took a modest step in this direction. Questions were raised as to whether the Convention covered artificially produced analogs of natural poisons (toxins) and whether it covered toxins produced by animals and plants in addition to those produced by bacteria. The Conference, therefore, affirmed that "the Convention unequivocally applies to all natural or artificially created microbial or other biological agents or toxins whatever their origin or method of production. Consequently, toxins (both proteinaceous and non-proteinaceous) of a microbial, animal or vegetable nature and their synthetically produced analogues are covered." Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacterial (Biological) and Toxin Weapons On Their Destruction, Sept. 26, 1986, 26 I.L.M. 196, 197 reprinted in *Final Declaration of the Second Review Conference of Parties to the Biological Weapons Convention*, PREVENTING A BIOLOGICAL ARMS RACE 391, 393, Sept. 1986 (Susan Wright ed., 1990).

B. Treaty Amendment Attempts

There have been few attempts to invoke formal amendment proceedings. The 1991 U.N. Conference on a Comprehensive Test Ban (LTBT) represents a notable exception because it sought an amendment to the 1963 Limited Test Ban.⁸⁶ The conference grew out of a 1988 proposal by six LTBT parties to amend the Treaty into a comprehensive test ban.⁸⁷ If passed, the proposed amendment would add Article VI, which states that protocols to the Treaty are incorporated into the treaty. In addition, it would add two new protocols banning all nuclear testing in any environment.

In 1989, the six initiators announced that over thirty-nine states formally requested an amendment conference.⁸⁸ The conference, held in January 1991, ended inconclusively. This was primarily due to opposition by the United States, which as a depositary state, had veto power over any decision to amend the treaty.⁸⁹ In the end, the Comprehensive Test Ban Treaty (CTBT), which opened for signature in 1996 and is currently in the ratification stage, superseded the LTBT.⁹⁰

The most ambitious amendment project involving a multilateral arms control agreement is the ongoing effort to "adapt" the 1990 Conventional Armed Forces in Europe (CFE) Treaty to the

86. See Tom A. Zamora, *LTBT Amendment Conference to Continue, But No Test Ban in Sight*, ARMS CONTROL TODAY, Mar. 1991, at 14.

87. See *id.*

88. See *id.*

89. The LTBT requires ratification by all of the depositary states (the United States, the United Kingdom, and the former Soviet Union) for an amendment's entry into force. The Conference did not formally close, but rather adjourned on January 18, 1991, leaving open the possibility that it could be reconvened at a future date. The U.S. delegation stated that it would boycott any future sessions of the conference, thus preventing amendment of the LTBT. See *id.* at 14, 17.

90. The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction may also represent the superseding of a treaty. See Convention on Anti-Personnel Mines, *supra* note 56, 36 I.L.M. at 1509, 1512. In 1996, the Protocol II to the Convention on Conventional Weapons was amended to strengthen its restraints on the use of land mines. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *as amended* May 3, 1996, 35 I.L.M. 1206, 1210 (1996). States were dissatisfied with these amendments because they did not amount to a total ban on anti-personnel land mines and thereafter negotiated the 1997 Convention through a separate conference. See Jim Wurst, *Closing In On a Landmine Ban: The Ottawa Process and U.S. Interests*, ARMS CONTROL TODAY, June/July 1997, at 14.

Soviet Union's breakup and the ongoing changes in the post-Cold War environment.⁹¹ The Organization for Security and Cooperation in Europe is apparently succeeding in this process despite the CFE Treaty's explicit adoption of the unanimity rule for amendments. Where the necessary political conditions exist, the unanimity rule is workable.

V. CONCLUSION

Some preliminary conclusions can be drawn from both legal history and modern procedures about the interaction of law and policy in amending arms control treaties.

A. *What Can Amendment Provisions Accomplish*

In determining what an amendment provision can accomplish, two questions must be considered: (1) What would the inclusion of an amendment provision accomplish in the negotiating phase and why is it customary to include one as an article in arms control treaties?; and (2) What is the objective of an amendment effort to an in-force treaty? Stated another way, to what end would countries invoke complicated amendment procedures?

A paradox exists at the heart of arms control treaty amendment clauses. On one hand, inclusion of an amendment provision is standard, allowing prospective parties to accept legally-binding provisions while recognizing that political change and technological and scientific advances may require future alteration of a treaty's text.⁹² On the other hand, parties rarely use amendment clauses. The more complex and difficult the amendment procedures prescribed, the more these clauses may deter amendment efforts.

Amending a treaty has inherent risks. If changes are not universally accepted, it may bifurcate the regime. Arms control treaties often represent carefully worked-out compromises affecting

91. See Flank Document Agreement to the CFE Treaty, S. TREATY DOC. NO. 105-5, (1997), 36 I.L.M. 866, at 872; see also Colonel Jeffrey D. McCausland, *NATO and Russian Approaches to 'Adapting' the CFE Treaty*, ARMS CONTROL TODAY, Aug. 1997, at 12.

92. During negotiation of the Limited Nuclear Test Ban Treaty, the U.S. Department of Energy was apparently nervous that limits would be too stringent concerning peaceful nuclear explosions. "[U]pon his return to Moscow, [Averill] Harriman conveyed to me his conviction that in due time it would be possible to amend the treaty in order to liberalize the rules for Plowsharer projects." GLENN T. SEABORG & BENJAMIN S. LOEB, *STEMMING THE TIDE* 317 (Lexington Books ed., 1987).

the most vital security interests of at least some of the parties. These parties must be assured that the final balance of compromises and concessions will not be upset at some later date by adoption of an amendment. Indeed, some countries may be concerned that one successful amendment attempt may gradually erode the original treaty by encouraging additional parties, who are dissatisfied with one element of a treaty, to seek change. Disgruntled parties may have specific grievances for which they seek redress, or political blocs may be encouraged to form and initiate change to suit parochial purposes.

B. Alternatives to Using the Amendment Option

Amending most major arms control treaties involves a complicated process of convening a special amendment conference and then garnering enough support to pass and adopt an amendment. As noted above, it seems that some amendment processes are intentionally designed *not* to be used. In part, parties design the procedural hurdles to avoid frivolous modification attempts.

There are ways to modify a treaty while preserving the fundamental obligations of its original text without seeking a formal amendment.⁹³ As previously discussed, other vehicles for changing or expanding treaty obligations include: (1) Agreed Interpretation (e.g., the Zangger Committee, which governs nuclear exports by NPT parties, is an agreed interpretation of Article III of the Nuclear Non-Proliferation Treaty);⁹⁴ (2) Addition of a Protocol or supplemental treaty (e.g., the BWC); (3) Compatible Treaties (e.g., Article VII of the Nuclear Non-Proliferation Treaty allows conclusion of regional nuclear weapon free zone agreements to supplement its regime);⁹⁵ and (4) Superseding Treaties (i.e., new agreements that build on and expand older ones, such as the Comprehensive Test Ban Treaty supplanting the Limited Test Ban

93. For a thorough consideration of the legal mechanisms that might be used for the step-by-step modification of treaties, see George Bunn, *Missile Limitation: By Treaty or Otherwise?*, 70 COLUM. L. REV. 1, 1-47 (1970). Some of these mechanisms are discussed in this section.

94. See, e.g., the nature of the Zangger Committee and its work, 1 NUCLEAR ENERGY AGENCY, THE REGULATION OF NUCLEAR TRADE 77-78, 83-84 (Org. for Econ. Cooperation & Dev., 1988).

95. See generally Treaty on the Southeast Asia Nuclear Weapon-Free Zone, *supra* note 58; Treaty for the Prohibition of Nuclear Weapons in Latin America, *supra* note 59.

Treaty).⁹⁶

The parties may agree to these approaches during meetings, such as in the Final Document of a Review Conference. An exchange of memoranda and understanding, as in the Biological Weapons Convention Verification Protocol, may also resolve which approach the parties will use. In addition, the parties may negotiate an entirely new treaty to reach an agreement.

Although risks to such alternative means exist, they present fewer legal challenges and are more acceptable to parties who may be reluctant to change a treaty's text. Many parties fear that changing a treaty's text may unravel the fundamental compromises made at the time of negotiation. By employing other means, it appears that parties try to balance the realization that a treaty is a living document, with a cautious reluctance to tamper with the actual legally-binding text. In essence, more fruitful and potentially less costly means can achieve desired ends.

C. A Lex Specialis for the Amendment of Arms Control Treaties?

Finally, it is interesting to speculate on the clauses this Article examines for the customary law of treaties. Over the past thirty years, no multilateral arms control treaty has adopted the liberal amendment provisions in Article 40 of the Vienna Convention on the Law of Treaties. Indeed, the recent trend has most significant military treaties (such as the Comprehensive Test Ban Treaty, the Chemical Weapons Convention, and the CFE Treaty) returning to the unanimity rule.⁹⁷ A consistent body of state practice suggests that Article 40 of the Vienna Convention should not be presumed to state customary international law. Indeed, if the agreement directly affects the military security of the parties, state practice suggests it is appropriate to return to the old presumption that the parties should not adopt an amendment over the objection of any individual state party.

96. See Comprehensive Test Ban Treaty, *supra* note 58.

97. This is either an express unanimity rule or an implicit unanimity rule, implemented by a consensus amendment mechanism.

TABLE 1

AMENDMENT PROCEDURES FOR SELECTED ARMS
CONTROL TREATIES

Treaty (date opened for signature)	Is An Amendment Conference Necessary?	Number Of States Who Must Call For A Conference	Number Of Votes Required At Conference To Amend	Amendment Enters Into Force Upon Ratification By:	Binding For Non- Ratifying Party?
Antarctic (1959)	Not required; possible	Any "Art. IX" state ⁹⁸	Majority, including majority of Art. IX states	All Art. IX states	No (penalty for holding out)
Limited Nuclear Test Ban (1963)	Required	1/3 of parties	Majority of all parties, to include US, UK, USSR ⁹⁹	Majority of all parties, to include US, UK, USSR	Yes
Outer Space (1967)	No			Majority of parties	No
Tlatelolco (1967)	General Conference	Any party	2/3 present and voting	Any party can bring into force	No
Nuclear Non-Pro- liferation (NPT) (1968)	Required	1/2 of parties	Majority of all parties, to include US, UK, USSR, & IAEA BOG ¹⁰⁰	Majority of all parties, to include US, UK, USSR, & IAEA BOG	No
Seabed (1971)	No			Majority of parties	No

98. The Article IX states are comprised of the 12 original parties to the Antarctic Treaty, plus any later parties engaged in "substantial scientific research" in Antarctica.

99. In general, the Russian Federation assumed the treaty obligations of the former Soviet Union after its breakup.

100. IAEA BOG stands for the International Atomic Energy Agency's Board of Governors.

Treaty (date opened for signature)	Is An Amendment Conference Necessary?	Number Of States Who Must Call For A Conference	Number Of Votes Required At Conference To Amend	Amendment Enters Into Force Upon Ratification By:	Binding For Non- Ratifying Party?
Biological and Toxins Weapons (BWC) (1972)	No			Majority of parties	No
Environ- mental Modifica- tion (1977)	No			Majority of parties	No
Moon & Other Celestial Bodies (1979)	No			Majority of parties	No
Physical Protection of Nuclear Material (PPNM) (1980)	Required	Majority of parties	2/3 of all parties	2/3 of parties	No
Certain Conven- tional Weapons (CCW) (1981)	Required	Majority (at least 18); ten years after EIF, any party	Consensus	20 states	No
Rarotonga (1985)	Consultative Committee	Any party	Consensus	All parties	N/A
Conven- tional Armed Forces in Europe (CFE) (1990)	No			All parties	N/A

Treaty (date opened for signature)	Is An Amendment Conference Necessary?	Number Of States Who Must Call For A Conference	Number Of Votes Required At Conference To Amend	Amendment Enters Into Force Upon Ratification By:	Binding For Non- Ratifying Party?
Chemical Weapons (CWC) (1990)	Required	1/3 of parties	Majority of parties & no negative votes	All parties voting in favor at conference	Yes
Open Skies (1992)	Required	3 parties	Approval of all parties	All parties	N/A
Compre- hensive Nuclear Test Ban (CTBT) (1996)	Required	Majority of parties	Majority of parties & no negative votes	All parties voting in favor at conference	Yes
Anti- Personnel Land- mines (1997)	Required	Majority of parties	2/3 present and voting	Majority of parties	No